VILVANATHAN v. OFFICIAL ASSIGNEE

[O.C.J. (Azmi J.) June 15, 1961]

[Ipoh — Originating Motion No. 21 of 1960]

Bankruptcy — Proof of debt by moneylender — Rejection of — No appeal — Whether a second proof can be filed — Moneylenders Ordinance, 1951, s. 20(2) — Bankruptcy Rules, 1921, r. 184.

Moneylenders — Bankruptcy proceedings — Proof of debt — Rejection of — Moneylenders Ordinance, 1951, s. 20(2).

Where a proof of debt in a bankruptcy under section 20(2) of the Moneylenders Ordinance, 1951 is rejected by the official assignee, whose decision is not appealed against such rejection remains valid and a second proof is consequently barred.

Cases referred to:-

(1) *Arjan Singh* v. *Hashim Angullia & Ors.* [1941] M.L.J. 55.

(2) *Teja Singh* v. *Ratan Singh* [1961] M.L.J. 39.

(3) *Brandon* v. *McHenry* [1891] 1 Q.B. 538.

ORIGINATING MOTION.

S. A. Lingam for the applicant.

H. N. Dias (Assistant Official Assignee) for the respondent.

Cur. Adv. Vult.

Azmi J: This is an originating motion by KR. Vilvanathan, a moneylender, for an order that the decision of the assistant official assignee dated the 3rd November, 1960, rejecting proof of debt submitted by the applicant be reversed and that the said proof of debt be admitted.

Now, the following facts are not disputed. The applicant obtained judgment against one Arumugam s/o Murugasu for $500/- and by consent of parties, Arumugam was ordered on the 11th May, 1960, by the magistrate's court to pay the debt due by monthly instalments of $20 commencing from the 7th June, 1960. On the 19th September, 1960, the said debtor was adjudicated a bankrupt on his own petition. On the 8th October, 1960, the present applicant submitted his proof of debt but that proof was rejected by the assistant official assignee on the 18th October, 1960, on the ground that the applicant had failed to exhibit as proof of debt a statement under section 20(2) of the Moneylenders Ordinance. This order of rejection was embodied in a notice of rejection signed by the assistant official assignee in which he also stated that subject to the power of the court to extend the time no application to reverse or vary his decision in rejecting the proof will be entertained after the expiration of 21 days from the date of notice.

On the 21st October, 1960, Mr. Lingam, on behalf of the applicant, applied to the Assistant Official Assignee for a fresh copy of the affidavit verifying the debt as the applicant, according to Mr. Lingam, wished to submit a fresh affidavit exhibiting a statement of account as required by section 20 of the Moneylenders Ordinance. At the same time, Mr. Lingam also said that section 20 of the Moneylenders Ordinance did not prohibit the submission of a new affidavit in case of rejection for non-compliance with section 20. To this request the assistant official assignee was not prepared to agree and suggested in his letter of the 20th October, 1960, that the applicant appeal against his order to the High Court.

On the 22nd November, 1960, the applicant filed this originating motion. Now section 20(2) of the Moneylenders Ordinance, 1951, says as follows: —

"No proof of a debt due to a moneylender in respect of a loan made by him shall be admitted for any of the purposes of the Bankruptcy Enactment of the Federated Malay States or any corresponding law in force in any other State or Settlement unless the affidavit verifying the debt has exhibited thereto a statement which complies with the provisions of section 19 of this Ordinance and shows, where the amount of interest included in the unpaid balance represents a rate per centum per annum exceeding eight per centum, the amount of interest which would be so included if it were calculated at the rate of eight per centum per annum."

The statement referred to above would appear to be a statement giving certain particulars, that is to say: —

(a) the date on which the loan was made, the amount of the principal of the loan and the rate per centum or the amount of interest charged; and

(b) the amount of any payment already received by the moneylender in respect of the loan and the date on which it was made; and

(c) the amount of all sums due to the moneylender for principal but unpaid and the dates upon which they became due and the amount of interest due and unpaid in respect of each such sum; and

(d) the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

As a matter of fact, the form of such a statement is given in the First Schedule to the Ordinance. It is this statement which the applicant failed to submit with his proof of debt to the assistant official assignee.

Mr. Lingam's submission is that this decision made by the assistant official assignee in the first instance rejecting the proof is not a judgment since he did not decide on questions of fact or law. It was not *res judicata* in the sense that he may and should accept the second proof of debt submitted on the 22nd November, 1960.

Now, it is in reference to the rejection of the second proof of debt made on the 22nd November, 1960, that this motion is made before me. Rule 184 of the Bankruptcy Rules says as follows: —

"184. Subject to the power of the court to extend the time no application to reverse or vary the decision of the Official Assignee in rejecting a proof shall be entertained after the expiration of twenty-one days from the date of the decision complained of".

This rule corresponds to Rule 261 of the English Bankruptcy Rules, 1952, which says: —

"261. No application to reverse or vary the decision of an Official Receiver or trustee rejecting a proof shall be entertained after the expiration of twenty-one days from the date of the decision."

It can be seen that these two rules are in *pari materia*.

In view of the fact that there is special provision in the rules for an appeal against rejection of proof,

I am unable to agree with Mr. Lingam that the rejection of proof is in every case a matter of form and therefore not final. The notes to the English Rule 261 in *Williams* on Bankruptcy (17th Edition) says as follows: —

"A creditor whose proof has been rejected on the merits cannot withdraw it and present another in the same form, but if the proof has not been adjudicated upon or has been rejected on a point of form it may be withdrawn and a fresh proof tendered."

If the assistant official assignee is right in holding that the statement under section 20(2) of the Moneylenders Ordinance should be submitted with the proof, then the failure to do so is an irregularity that cannot be cured and is fatal to any subsequent proceedings. It was held in *Arjan Singh* v. *Hashim Angullia & Ors.*,[1] that: —

"When a moneylender sues upon a moneylending contract, a statement of his account as prescribed in section 7 of the Moneylenders Ordinance must be produced at the time of suing and particulars should accordingly be filed with the writ of summons. Non-compliance with this statutory requirement is an irregularity which the court cannot waive and will entitle a defendant to have the writ of summons set aside with costs."

The above judgment was cited with approval by the Court of Appeal in the case of *Teja Singh* v. *Rattan Singh*.[2]

It would appear to me that the decision of the assistant official assignee could not be regarded as one on a point of form only.

In my view it would still be necessary for the applicant to have the decision made by the assistant official assignee on the 18th October, 1960, set aside and so long as that decision stands the applicant cannot file a fresh one in the same manner .

I am fortified in my judgment to a certain extent by the case of *Brandon* v. *McHenry*.[3] The question in that case was whether a rejection of proof by a trustee in bankruptcy is an act done by him within section 81 of the Bankruptcy Act, 1869, corresponding to section 29(2) of the Bankruptcy Act, 1914, and corresponding to section 20(2) of our own Ordinance. The head-note says: —

"Therefore, where a proof in a bankruptcy under the above-mentioned Act is rejected by the trustee, whose decision is not appealed against, and the bankruptcy is subsequently annulled, such rejection remains valid, and the claim for the amount sought to be proved for is consequently barred."

I would, therefore, dismiss the motion with costs.

Motion dismissed.

Re LOW NAI BROS. & CO.
Ex-parte OFFICIAL ASSIGNEE
v. GUTHRIE & CO. (M) LTD. & ORS.

[O. Bk. J. (Gill J.) December 19, 1968]

[Kuala Lumpur — In Bankruptcy No. 70 of 1967]

Bankruptcy — Money received pursuant to garnishee proceedings — Whether void against official assignee as trustee of bankrupt's properties — Bankruptcy Act, 1967, s. 50(1) & (2).

Mercantile law — Bankruptcy law — Whether part of mercantile law — Civil Law Ordinance, 1956, s. 5(1) — Discretionary relief — Granting of.

The official assignee sought for a declaration that the receipt by the respondents of certain sums of monies in three civil suits pursuant to garnishee proceedings in each of those civil suits in which the respondents were the judgment creditors and the three bankrupts were the judgment debtors were void against him as trustee of the properties of the bankrupts under the provisions of the Bankruptcy Act, 1967 in that the said sums were received by the respondents after the receiving order was made against the said bankrupts on March 20, 1967, and for an order that the respondents do pay the said sums to him as trustee in bankruptcy.

Held: (1) a creditor who has attached any debt due to the debtor is not entitled to retain the benefit of such attachment against the official assignee unless he has completed the attachment by receipt of the debt before the date of the receiving order;

(2) the test is, not whether there has or has not been a garnishee order absolute, but whether the garnishee proceedings has resulted in actual payment before the making of the receiving order;

(3) in this case, as the receiving orders against the debtors were made on March 20, 1967, and the respondents as creditors received the benefit of the attachment of the debts due to them on April 14, 1967, they were therefore not entitled to retain such benefits against the official assignee.

Cases referred to:-

(1) *George* v. *Tompson's Trustee* [1949] 1 Ch. 322.

(2) *Re Lupkovics, Ex parte The Trustee* v. *Freville* [1954] 1 W.L.R. 1234.

(3) *Figg* v. *Moore Brothers* [1894] 2 Q.B. 690.

(4) *Re Chop Kee Chiang* [1933] M.L.J. 283.

(5) *Seng Djit Hin* v. *Nagurdas Purshotumdas* [1923] A.C. 444.

BANKRUPTCY.

L. Kandan for the applicant.

S. W. S. Davidson for the respondents.

Cur. Adv. Vult.

Gill J.: This is a motion by the official assignee for a declaration that the receipt by the first respondents of the sum of $10,281.70 in Ipoh High Court Civil Suit 407/65, by the second respondents of the sum of $3,946.36 in Ipoh High Court Civil Suit 556/65 and by the third respondents of the sum of $11,421.33 in Ipoh High Court Civil Suit 531/65 on or after 5th April, 1967 pursuant to garnishee proceedings in each of those civil suits in which the respondents were the judgment creditors and the three bankrupts the judgment debtors, are void against him as trustee of the properties of the bankrupts under the provisions of Bankruptcy Act 1967 in that the said sums of money were received by the respondents after the receiving order was made against the said bankrupts on the 20th day of March, 1967, and for an order that the respondents do pay the said sums to him as the trustee in bankruptcy.

The facts in support of the motion as set out in the affidavit of the senior assistant official assignee, Mr. Muthiah Rajendram, affirmed on 18th December, 1967 and filed in these proceedings are as follows. A receiving order against Low Nai Brothers and Company of No. 35, Jalan Pekeliling, Kuala Lumpur on the